



REPUBLIC OF KENYA



In re Estate of Elijah Ongoro Mogaka (Deceased) (Succession Cause 525 of 2010) [2023] KEHC 25036 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEHC 25036 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
SUCCESSION CAUSE 525 OF 2010
TA ODERA, J
OCTOBER 26, 2023
IN THE ESTATE OF ELIJAH ONGORO MOGAKA (DECEASED)**

BETWEEN

RICHARD LUKE NYAMBATI APPLICANT

AND

CHRISTINE OBIRI NYAMBATI 1ST RESPONDENT

SUSAN NYAMBATI 2ND RESPONDENT

RULING

1. By a Summons for Revocation of Grant filed under a Certificate of Urgency and dated 31st August 2023, filed through the firm of Linet Miencha & Co. Advocates, brought under Sections 47 and 76 of the Law of Succession Act, Cap 160 of the Laws of Kenya, and Rules 26(1) and 44(1) of the Probate and Administration Rules, 1980, Section 68(1) of the Land Registration Act, the Applicant herein seeks the following orders: -
 1. That the Court be pleased to issue summons for revocation and/or annulment of grant issued to the Respondents.
 2. That the grant made to Christine Nyambati and Susan Nyambati on this 10th day of February 2012, be revoked on the Grounds that:
 - a. That the proceedings to obtain the Grant were defective in substance;
 - b. That the Grant was obtained fraudulently by making of false statements and/or by concealing of material facts from Court on something material to this case.
 - c. That the grant was obtained by means of an untrue allegations (*sic*) of a fact essential in point of law to justify the grant.



- d. That the Grant was issued without notice to the legitimate beneficiaries.
 - e. That the Grant was obtained by means of untrue allegations and misrepresentation of facts particularly that the Respondents alienated the primary and sole dependants being the Applicant's family and claimed a spousal interest;
 - f. That the grant was obtained by means of untrue allegations and misrepresentations of facts particularly that the Respondents are total strangers to the estate of the deceased and to the Applicant's family.
3. That this Honourable Court be pleased to issue orders of eviction and/or permanent injunction to the Respondent either by herself, her agents, servants, personal representative, assigns or such other person under instructions from entering upon, developing, erecting or in whatever manner trespassing on to land registration Title Deed no Nyansiongo/Scheme/522 the same having been sub-divided fraudulently in the year 2004 and/or illegally issuing of the purported Title Deeds no Nyansiongo/Settlement/Scheme/991, 992 and 1012 even before succession process was initiated.
 4. That costs of the Application be provided for.
2. The Application was supported by an Affidavit sworn by Richard Luke Nyambati, the Applicant herein. He deponed that he is one of the heirs, dependents and/or beneficiaries of the Estate of Elijah Ongoro Mogaka (Deceased) with authority to swear the Affidavit on his own and on behalf of Francis Mogaka, Everlyne Nyambati and Lucy Nyambati, the Applicants' siblings. He deponed that the Respondents concealed material facts and obtained the grant by means of untrue allegations. He deponed that the Land Parcel no Nyansiongo/ Settlement/ Scheme/ 522 was unlawfully and/or illegitimately sub-divided in 2004 without any succession proceedings and the said sub-division gave rise to Land Parcel nos. Nyansiongo/ Settlement/ Scheme/ 991, 992 and 1012. The Deceased passed away on 9th April 2003. He further deponed that their late father, Kennedy Nyambati Ongoro, passed away on 9th January 1998 and was the only surviving son of the Late Elijah Ongoro Mogaka, the Deceased herein. He deponed that their late father had one wife, Margaret Barongo, who passed away on 15th August 2010. The Late Elijah Ongoro Mogaka had 2 wives, the 1st wife died whilst the 2nd wife, Naomi Nyaboke Mogaka, is still alive. He further deponed that the Deceased, Elijah Ongoro Mogaka, was the registered owner of Land Parcel no Nyansiongo. Settlement/ Scheme/522 and other parcels of land. After his death, his Estate was intermeddled with and his land was illegally subdivided and allocated to the intermeddlers. The Title nos. Nyansiongo/ Settlement/ Scheme/ 991, 992 and 1012 were closed on 11th June 2003. However, the Respondents and Joseph Mokaya Migiro registered themselves as the proprietors: Nyansiongo/ Settlement/ Scheme/ 991 was registered in the name of Joseph Migiro Mokaya and a title issued on 12th March 2004; Nyansiongo/ Settlement/ Scheme/ 992 and 1012 titles were issued on 6th June 2004 and 9th August 2012 respectively.
 3. He deponed that their grandmother, and wife of the Late Elijah Ongoro Mogaka, Naomi Nyaboke Mogaka, petitioned for a grant over the Deceased's Estate *vide* High Court Kisii Succession Cause no 124'B' 2012 Estate of Elijah Ongoro Mogaka (Dcd) which she did not follow up on, on account of her age and intimidation and threats from known and unknown people. He deponed that Naomi Nyaboke Mogaka wrote to various offices on account of the illegal subdivision and alienation of her late husband's land. He alleged that the Respondents and Joseph Migiro Mokaya fraudulently, and without their consent, knowledge or notice from the beneficiaries of the Estate, subdivided the suit properties without following the procedures under the [Law of Succession Act](#).



4. He deponed that he raised a complaint on 20th January 2020 with the Area Chief who then wrote to the County Land Registrar of Nyamira and requested for an investigation into the matter. The then Land Registrar summoned the relevant Parties to appear before him with their relevant documentation but the Respondents and Joseph Migiro Mokaya declined to surrender their documents. He deponed that he also instituted a succession suit over the Deceased's Estate *vide* Keroka PMSUCC no E041 of 2022 Estate of Elijah Ongoro Mogaka, and became the Administrator of the Estate of the Deceased herein.
5. He deponed that he filed a suit against Joseph Migiro Mokaya, in Keroka PMELCC no E016 of 2021. The 1st Respondent filed an application in Keroka PMELCC no E016 of 2021 seeking to be joined as an interested party, which application was, however, dismissed. The 1st Respondent subsequently filed a new matter Keroka PMELCC no E009 of 2023 wherein she sued the Applicant herein for trespass in Land Parcel no Nyansiongo/ Settlement/ Scheme/ 1012 which she claimed belonged to her. Keroka ELC no E016 of 2021 was put into abeyance pending the determination of Keroka PMELCC no E009 of 2023. Subsequently, Keroka ELCC no E009 of 2023 was dismissed. He deponed that the 1st Respondent produced a copy of the Grant of the Letters Intestate for the Estate of Elijah Ongoro Mogaka naming her as one of the Administrators and consequently, Keroka ELCC no E016 of 2021 was again put in abeyance pending the revocation or otherwise of the 1st Respondent's Grant in the instant succession proceedings.
6. He deponed that the 1st Respondent only included her children as the beneficiaries of the Estate of the Late Elijah Ongoro Mogaka. At the time of filing the succession proceedings, the Applicant's mother was alive but was not included in the succession proceedings. He deponed that the Respondents intentionally failed to include all the Deceased's dependents and thereby fraudulently obtained a grant. He deponed that his father, the Late Kennedy Nyambati Mogaka, only had one wife, Margaret Barongo, who died in 2010. He deponed that the 1st Respondent was therefore not a legitimate wife of the Late Kennedy Nyambati Mogaka and there was no proof towards that assertion. He deponed that the Late Elijah Ongoro Mogaka did not have 4 surviving dependents. He deponed that the 4 listed dependents Christine Nyambati, Susan Nyambati, Jackline Nyarangi Nyambati and Clinton Mogaka Nyambati were unknown to them. Further, the Late Kennedy Nyambati Mogaka died in 1998, but Clinton Mogaka Nyambati was 7 years old in 2012 and could therefore not be his child. He further deponed that Susan Nyambati, Jackline Nyarangi Nyambati and Clinton Mogaka Nyambati were not their siblings neither were they their stepsisters and stepbrother respectively.
7. He deponed that the 1st Respondent was registered as the proprietor of Title no Nyansiongo/ Settlement/ Scheme/ 992 on 6th December 2004 whilst the succession proceedings were filed on the year 2010 and confirmed on 10th February 2012. He deponed that the 1st Respondent was also in possession of a Title Deed for Land Parcel no Nyansiongo/ Settlement/ Scheme/ 1012 issued on 9th August 2012 in her name only. However, the Applicant deponed that *vide* a Green Card dated 15th May 2023, Land Parcel no Nyansiongo/ Settlement/ Scheme/ 1012 was initially registered in the names of 3 people meaning that the said land parcel had 2 different Title Deeds.
8. He deponed that the Chief's letter dated 26th April 2010, produced by the Respondents when filing the succession proceedings in Kisii HCSUCC no 525 of 2010 Estate of Elijah Ongoro Mogaka, was written by someone who masqueraded as the then Acting Senior Chief of the relevant area. Essentially, the Respondents intermeddled with the Deceased's Estate and effectively disinherited the Applicant and his siblings. He prayed that his Application be allowed as prayed.
9. The Respondent have not filed any document in response.



Determination

10. I have considered the Application herein.
11. I have gone into great detail to reproduce the contents and crux of the Applicant's case since it is evident that there are a lot of allegations therein and various issues come to the fore.
12. I have perused the Applicant's Affidavit of Service. According to the said Affidavit of Service, the Applicant's Counsel deponed that she served the Application, Order and Authority via WhatsApp no xxxx. She further deponed that the said WhatsApp message was blueticked, thus a sign that it was received by the Respondents.
13. In light of the grave allegations made in the Application and that the Respondents have so far not filed any documents in response, I am therefore minded to consider if service was proper in the circumstances.
14. Rule 63 of the *Probate and Administration Rules*, 1980 provides: -
 - (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the *Civil Procedure Rules*, namely Order 5, rule 2-34 and Order 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.) together with the *High Court (Practice and Procedure) Rules* (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
 - (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.
15. Rule 65(5) of the *Probate and Administration Rules*, 1980 provides
 - (5) Unless the court or registrar for reasons to be recorded otherwise directs or these Rules otherwise provide, every notice or document required to be given to or served upon any person who has not entered an appearance nor given an address for service shall be given or served in accordance with the provisions of Order 5, rule 2 to 34 of the *Civil Procedure Rules* (Cap. 21, Sub. Leg.)
16. Order 5 Rule 22C on Mobile-enabled Messaging Applications provides as follows: -
 1. Summons may be sent by mobile-enabled messaging Applications to the defendant's last known and used telephone number.
 2. Summons shall be deemed served on the day which it is sent, if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
 3. Service shall be deemed to have been effected when mobile-enabled messaging services when the Sender receives a delivery receipt.
 4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the delivery receipt confirming service.
17. Order 5 Rule 15 provides: -



- (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person [if any] identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form no. 4 of Appendix A with such variations as circumstances may require.
 - (2) Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month's imprisonment or both.
18. Counsel depones that she served via WhatsApp to xxxx. She does not indicate who is the registered owner of that line neither does she attach proof the same. She does not state how she came about the said phone number. She does not identify the person served, the deponent only states "...That the said whatsapp message was blueticked a sign that it was received by the Respondents herein."
 19. Notably, there are 2 Respondents. There is nothing to prove to this Court that the phone number belongs to either one of them or both of them. Do they share the phone number? In fact, a cursory look at the annexure shows that someone saved as "Christine Nyamb...." was served on 26th September 2023 with the application herein at around 12.10 p.m. The Affidavit of Service speaks of service to the Respondents at around 2.00 O'clock.
 20. In the circumstances, I find that service was not proper.
 21. I agree with the finding in *Omar Shallo v Jubilee Party of Kenya & another* [2017] eKLR, where the Court relied on the case of *Law Society of Kenya v Martin Day & 3 Others* [2015] eKLR, and held that it was imperative that the procedure for service be adhered to. The Court further held in paragraph 14 of the said Judgment, the Court underscored that the "Essence of service is to notify a party of a case against him in order to respond appropriately and defend himself. It is premised on the right of every person to be heard..."
 22. I am also in agreement with the finding in the case of *Kennedy Omondi Obuya v Orange Democratic Movement Part & 2 Others* [2017] eKLR, the Court held as follows:

"The Appellant denies that he was served with the pleadings. He further denies having been received (*sic*) the documents either through email or through a Whatsapp message. It is not clear how the 2nd Respondent was able to ascertain that the cellphone owned by the Appellant had capacity for the Whatsapp to be activated. The affidavit of service did not indicate the cellphone number of the Appellant which if the circumstances necessitated, may have aided the PPDT if it wanted to verify if indeed service was effected by the 2nd Respondent upon the Appellant. On re-evaluation of the evidence placed before this court, it is clear that the 2nd Respondent did not effect proper service upon the Appellant to entitle the PPDT to proceed with the hearing of the complaint lodged before it in the absence of the Appellant."
 23. The right to be heard fairly is fundamental and now entrenched in *the Constitution* of Kenya. This right to be heard includes the right to be informed existence of a case and to be granted reasonable time prepare for trial. This was the finding in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 Others* [2021] KESC 39(KLR) where the Supreme Court of Kenya emphasized the principles and importance of fair hearing and considered the provisions of Articles 25 & 51 of *the Constitution*, the African Commission on Human and People's Rights, the SCJ decision in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4*



Others Petition no 18 of 2014 as consolidated with Petition no 20 of 2014 [2014] eKLR, SCJ decision in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others Petition no 7 of 2018 [2018] eKLR. (See Paragraphs 36-54)

24. Having found that service was not proper, I hereby direct that the Applicant cause physical service of the Application upon the Respondents herein within the next 14 days of the date of this ruling. I further direct that the Application be served upon Naomi Nyaboke Mogaka and Joseph Mokaya Migiro.
25. Costs shall be in the cause.

DATED, DELIVERED AND SIGNED AT KISII THIS 26TH DAY OF OCTOBER, 2023.

TERESA ODERA

JUDGE

In the presence of:

Mr. Miencha for the Applicant

N/A for Respondents

Alex Oigo - Court Assistant

Miencha: We seek that we be allowed to effect substituted service upon the respondent as finding the respondents physically has proved difficult.

Order: The applicant is granted leave to effect substituted service if physical service fails. Mention on 21.11.23

T.A ODERA

JUDGE

26.10.23.

